Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	RM-11293
	)	
	)	RM-11303

REPLY COMMENTS OF AMEREN SERVICES COMPANY AND VIRGINIA ELECTRIC AND POWER COMPANY

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SUMMARY

In these reply comments, Ameren Services Company ("Ameren") and Virginia Electric and Power Company d/b/a Dominion Virginia Power ("Dominion Virginia Power") reiterate their support for the infrastructure partnership approach to the issues raised in this proceeding by the Commission and by commenting parties.

Ameren and Dominion Virginia Power reaffirm how respect for utility infrastructure by all attaching entities instructs issues like engineering, make-ready, safety standards and access. Similarly, an infrastructure partnership must entail a fair allocation of the true and total costs of maintaining the infrastructure, which is critical to all attaching entities and their customers. This includes the continuation of the special relationship between electric and telephone utilities, which have shared pole ownership responsibility for decades, as well as the accommodation of wireless attachments, which are proliferating across the nation.

Ameren and Dominion Virginia Power believe the Commission has the opportunity to create watershed change in the realm of pole attachment regulation. To do so, however, the Commission must stay the course it has laid out in the Notice of Proposed Rulemaking and adopt a regulatory regime that respects and supports the infrastructure upon which all of the commenting parties rely.

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Ameren Services Company ("Ameren"), and Virginia Electric and Power Company d/b/a Dominion Virginia Power ("Dominion Virginia Power") respectfully submit these reply comments in the above-captioned proceeding.[1]

INTRODUCTION

If anything is clear from the 50-plus sets of comments filed in this proceeding, it is this: the humble utility pole that has existed since the mid-19th century is now central to a take-no-prisoners battle among providers of advanced communications in the 21st century. Indeed, in this proceeding, parties not entitled by statute to mandatory access to poles, such as wireless broadband and distributed antenna system (DAS) providers, now demand mandatory access and regulated rental rates. Incumbent local exchange carriers (ILECs), expressly excluded from attachment rights under the Pole Attachments Act, now seek both regulated rates and rights of

[1] Ameren Services Company is a service subsidiary of Ameren Corporation and is filing these reply comments on behalf of four utility operating subsidiaries of Ameren Corporation (Union Electric Company d/b/a AmerenUE, Central Illinois Light Company d/b/a AmerenCILCO, Illinois Power Company d/b/a AmerenIP and Central Illinois Public Service Company d/b/a AmerenCIPS. Ameren and Dominion Virginia Power filed initial comments in this proceeding.

access. Still other attachers, including wireless telecommunications carriers, cable operators, and competitive local exchange carriers (CLECs), seek to annex utility poles through the attachment of myriad wireless devices, power supplies, and overlashed attachments, and the use of extension-arms and temporary attachments, and the boxing of poles.

The strain these commenters place on the pole, both literally and figuratively, stands to compromise the integrity of this obviously indispensable infrastructure. The Commission cannot and must not ignore the strain put upon pole infrastructure that has been created by the proliferation of attachments used to provide telecommunications and broadband offerings. Ameren and Dominion Virginia Power posited in their initial comments that the clearest way for the Commission to balance the competing interests of all entities that rely on and benefit from the existence of this infrastructure is to support a concept of infrastructure partnership, which enforces respect for pole infrastructure and encourages all entities that benefit from the pole to follow good pole stewardship procedures and pay their fair share to support its integrity, reliability and longevity.[2]

In these reply comments, Ameren and Dominion Virginia Power illustrate how the existing infrastructure partnership between pole owning entities should remain, and by statute must remain, unchanged. Similarly, these reply comments explain why the engineering of utility infrastructure should be left to the pole owning entities, and where applicable, to oversight of local utility practices by state regulatory regimes that already exist. Ameren and Dominion Virginia Power also explain how the concept of infrastructure partnership supports a rental rate for pole attachments that reflects a fair distribution among all attaching entities of the true costs to maintain the utility pole.

[2] *See* Comments of Ameren Services Company and Virginia Electric and Power Company, WC Docket No. 07-245 (filed March 7, 2008) at 4 *et seq* ("Comments"). Unless stated otherwise, other comments cited in this reply also were filed in WC Docket No. 07-245 on March 7, 2008.

Finally, Ameren and Dominion Virginia Power address wireless attachments. In keeping with the concept of infrastructure partnership, Ameren and Dominion Virginia Power agree that certain wireless attachments can be accommodated on utility poles so long as attaching parties pay the fair costs for such access. Yet, because of the wide variety of configurations of such attachments and resulting engineering concerns, utility poles cannot accommodate every attachment or every attachment practice that wireless proponents seek.

Ameren and Dominion Virginia Power believe that this proceeding offers the Commission the opportunity to simplify and improve upon its pole attachment regulatory regime. This opportunity must begin and end, however, with respect for the utility pole that is being asked to shoulder the next generation of telecommunications facilities, while still delivering the safe and affordable electricity that, in most cases, powers these very advancements.

REPLY COMMENTS

I. Infrastructure Partnership Requires Respect for Utility Infrastructure and Localized Control of Engineering and Safety Issues.

The utility pole is a crucial piece of critical infrastructure. Any overburdening or weakening of any element of this infrastructure would present real challenges not simply for electric utilities and their customers, but also for telecommunications companies and broadband providers and their customers, as well as first responders who rely upon communications networks riding in part on utility poles. It is time for all tenants on the pole to stop regarding their space on the pole as mere "surplus capacity" and instead to regard their space as a federally-granted right with commensurate stewardship obligations.

Out of this understanding of the importance of the electric utility pole arose Ameren and Dominion Virginia Power's support for an infrastructure partnership among all attachers. As

explained in considerable detail in Ameren and Dominion Virginia Power's initial comments, an infrastructure partnership requires an acceptance of certain inherent truths of pole stewardship, among them: (1) the pole owner and all attaching entities have a stake in assuring the integrity, reliability and safety of the pole infrastructure; (2) pole owners and attaching entities must share meaningfully (if not necessarily equally) in the costs of maintaining and defending the infrastructure; and (3) electric utilities have been given the main responsibility of maintaining and protecting the infrastructure, and their ability to do so should not be usurped.

A. The Commission Should Adopt Key Concepts of Infrastructure Partnership.

Ameren and Dominion Virginia Power's initial comments set forth six basic policies that underlie the concept of infrastructure partnership. These policies address many of the concerns expressed in the initial comments made by others in this proceeding.

First, no attachments should be located on poles unless they have been engineered to be on the pole. Although this concept is obvious, and a failure to place attachments without authority is a trespass under law, it is not always followed. Several pole owners, most notably Oncor, note major and on-going problems with unauthorized attachments. Comments of Oncor Electric Delivery Co. at 14. Further, some attaching entities like Current Group ask the Commission to permit temporary attachments placed without *any* make-ready work whatsoever: "where make-ready work would otherwise delay an attacher's ability to begin constructing facilities, the NESC permits temporary attachments in the communications space to be made with as little as three inches spacing from other such attachments rather that the twelve inches of spacing that is typically required for permanent attachments." Comments of Current Group at 6. The Commission should resist any attempt by any party to place any new attachment on utility poles without the knowledge of the pole owner and the completion of all requisite make-ready

work. The creation of any right of temporary attachment would undermine completely infrastructure safety.

Second, attachments should be made only if a pole attachment agreement is held with the pole owner and the attachments are made in accordance with an appropriate permit. As above, this common practice prevents unauthorized or otherwise unsafe attachments.

Third, all facilities installed must comply with the National Electrical Safety Code (NESC). Ameren and Dominion Virginia Power hasten to add, however, that the NESC establishes *minimum* guidelines. Several commenting parties have asked the Commission to determine that if an attachment practice satisfies the NESC, it should be presumptively reasonable, or that the Commission should prohibit pole owners from declining attachments if they meet NESC standards. *See, e.g.,* Comments of DAS Forum at 9 (Commission should require pole owners to allow NESC-compliant attachments, and forbid excessive and arbitrary safety requirements that exceed NESC standards); Comments of NextG Networks at 22 (as long as NESC standards are met, Commission should permit attachment practices like installation of equipment boxes in unusable space); 26 (Commission should establish a presumption that wireless attachments that comport with the NESC and FCC and OSHA regulations may not be denied on the basis of safety or reliability); Comments of Crown Castle Solutions at 4 (Commission should create a presumption that pole-top antennas constructed to NESC standards are safe and may not be prohibited by a pole owner). As described next, however, the NESC sets the floor for the safety of pole attachments, not the ceiling.

Fourth, the NESC is not the only standard for attachment practices. Pole attachments must also be made in compliance with various state requirements that often provide more stringent requirements than the NESC. *See, e.g.,* Comments of Oncor at 8 (NESC requires

insulated communications conductors to be 15.5 feet above roads, Texas requires 18 feet). Further, "the NESC is not a construction manual." *Id.* at 5 (noting that Section 010 of the NESC states that the NESC sets forth "basic provisions" that are "not intended as a design specification or as an instruction manual"). All pole owners, including Ameren and Dominion Virginia Power, require specific engineering and construction guidelines that in many instances go beyond the "basic provisions" of the NESC. *See* Declaration of Michael Roberts, appended hereto as Exhibit A ("Roberts Declaration"), at 1-2. The Commission must refuse to adopt a determination that the NESC is the only standard—or the maximum standard—for the safety and engineering of pole attachments. To do so would immediately create a conflict with the laws of most states, and would undermine the internal operating procedures of virtually all pole owners.

Fifth, all attaching entities, along with the pole owner, must share in the costs for the facilities, including repair, maintenance, inspection, and replacement of the pole. As set forth below, the best way to preserve the utility pole is for all of its beneficiaries to help pay for its ongoing vitality.

Sixth, the Commission must require that all attaching entities must be a party to a pole attachment agreement, and that any attachments made that are not subject to such an agreement are subject to civil, equitable, and criminal penalties. Pole owners must have the right to police the integrity of the pole infrastructure. Safe and reliable poles benefit all lawful attachers. Moreover, the penalties must, in fact, be penal. Insufficient penalties provide no disincentive to attaching parties to avoid making illegal attachments. In fact, if the penalty does not exceed the revenue to be derived from serving customers over unauthorized attachments, a "catch me if you can" incentive is created.

If the Commission would adopt these core principles of an infrastructure partnership, Ameren and Dominion Virginia Power believe the Commission can move all parties to a new era of pole attachment cooperation, largely devoid of animosity, improper pole attachment practices, and costly litigation. Under such a scenario, the Commission also can avoid regulating the minutiae of safety and access issues advocated for by Fibertech and others, which is discussed next.

B. The Commission Should Decline To Adopt Fibertech and Other Attachment Practices.

1. Commission Should Decline To Adopt Utility "Best Practices."

The NESC, state regulation, and internal utility requirements guide decisions as to what are safe and prudent pole attachment practices. With these layers of requirements, there are few universally allowed—or disallowed—attachment practices. Thus, in some systems, pole top attachments are allowed, in others they are not. In some systems, boxing of poles is allowed, and in others, it is forbidden. The Commission should not endeavor to create presumptions of what are "best practices" for the thousands of electric utilities in the United States, which must already follow various state and local requirements. *See* Comments at 12-13 (noting that over 3,170 electric utilities exist in the United States, and that in most states, issues of electric utility safety and reliability already are regulated by state utility commissions). Instead, the Commission should remain watchful for instances where attaching entities are discriminated against or where attachers make unsafe attachments and use its extant adjudicative authority to take appropriate corrective action.

2. Commission Should Decline Make-Ready Timelines.

Perhaps the most commented-on proposal regarding engineering concerns the issue of make-ready work performed by pole owners. As Ameren and Dominion Virginia Power noted

in their initial comments, attaching entities have long alleged that utilities have slowed their network deployment by the time taken for necessary make-ready work. Comments at 4. What is clear from the comments made in this proceeding, however, is that few attachers seem to agree on what might be a sufficiently expedient time frame. The DAS Forum, for example, seeks an aggressive 45-day limit on survey and make-ready work, and the right to contract the work if the utility fails to respond in this timeframe. Comments of DAS Forum at 9-10. Cavalier Telephone supports a 60-day limit for make-ready. Comments of Cavalier Telephone at 6. One commenter, segTEL, supports a 90-day timeframe for make-ready where a pole replacement is not required, and 180 days where a pole must be replaced. Comments of segTEL at 6. Sunesys supports a six month period from application to permit. Comments of Sunesys at 13-14. WOW! Internet Cable & Phone suggests a graduated schedule for make-ready, including the example of 90 days for up to 750 poles. Comments of WOW! Internet Cable & Phone at 4. Finally, some commenting parties are not sure how long make-ready should take, but that in any event the period should be "shorter." Comments of Alpheus et al. at 2.

What is apparent from these requests is that each attaching entity bases its sense of what is expedient on its own business model or the nature of its competition, and that anything that fails this expectation is seen as discriminatory. Certainly, segTEL should be credited with understanding that pole change-outs take considerably more time than other make-ready, and WOW! is correct that as the number of poles increases, so too does the time needed for make-ready. What even WOW! and segTEL do not realize, however, is that the performance of make-ready is one of many pole duties that electric utilities are called upon to perform. In addition to make-ready work, pole owners must also deal with customer outages, storm recovery, governmental relocation requests, routine utility maintenance, and essential capital projects.

Delays in make-ready are never the result of animosity or discrimination against attaching entities, but under the concept of infrastructure partnership, even rare instances of this would be virtually eliminated as the parties work out mutually-agreeable solutions.

Pole owners should not be subject to enforcement, or contract damages, simply because their core business needs must in some instances take precedence over make-ready work affecting the build-out schedule of attaching entities. The concept of infrastructure partnership would, moreover, move the construction needs of attaching entities closer to the core business needs of the pole-owning utility.

Further regulation of the make-ready process is unnecessary. Attaching entities retain the right to seek relief before the FCC should a pole owner refuse to perform make-ready or otherwise discriminate against them. Pole owners and attaching entities already are aware of the Commission's findings over thirty years regarding make-ready issues and generally succeed in keeping their relationships harmonious. As a result, the number of access complaints before the Commission has diminished to the point that the Commission should be wary of any further regulation.

II. Infrastructure Partnership Requires an Equitable Sharing of Pole Costs.

The concept of infrastructure partnership also requires that all parties that benefit from the pole infrastructure pay a fair and meaningful share for their use of that infrastructure, commensurate with the benefit they receive. As Ameren and Dominion Virginia Power previously urged in their initial comments, the Commission should institute a broadband rental rate for the vast majority of attachments that will capture the full costs of pole infrastructure and share those costs equitably among all attaching entities.

Most commenters in this proceeding support the institution of a broadband rate and a more equitable sharing of pole attachment costs. Although the comments of cable providers provide an obvious and expected exception, their comments serve as a homing beacon to identify certain attaching entities who benefit greatly from the pole infrastructure, but who manifest no interest in supporting the utility infrastructure that provides electricity, cable television, telephone, and Internet services throughout the country. As such, they only buttress the argument for the Commission to step in and mandate a new covenant of pole attachment respect and regulation.

A. Support for a Presumptive Broadband Rate

The Commission should not only adopt a third formula rate for attachments used to provide broadband services,[3] but should also make this a presumptive rate. Several commenters from various industries support this approach.

1. The Commission Has the Authority to Establish a Third Formula Rate for Attachments Used to Provide Broadband.

Most commenting parties support the establishment of a broadband formula for pole attachment rental. Various parties pointed to the commercial sensibility of charging to providers of nearly identical services a similar pole attachment fee. Alpheus Communications and 360Networks, for example, stated that the Commission should adopt a unified rate for providers of "the same or similar services." Comments of Alpheus Communications *et al*. at 5. Similarly,

[3] Ameren and Dominion Virginia Power's initial comments reference the Commission's definition of broadband, namely, a data transfer rate of 200 kilobits per second (kbps), as a practical way to classify facilities that would be subject to the broadband rate. At its open meeting on March 19, 2008, the Commission expanded the Wireline Competition Bureau's broadband data gathering function to capture data relating to seven tiers of broadband service. The Wireline Competition Bureau's presentation, including the new tiers, is available at http://www.fcc.gov/WCB_031908_open_meeting_slides.pdf. Ameren and Dominion Virginia Power are not necessarily arguing for the broadband threshold to be 200 kbps, which the Commission now considers to be "1st Generation Data." Perhaps the threshold should be 768 kbps, which the Commission now considers to be "Basic Broadband." The point is that the Commission should specify the data transfer rate that attaching entities are rebuttably presumed to provide, in order to avoid the kind of evasion and non-reporting that has been at the root of so much litigation.

AT&T supports the establishment of a uniform rate for attachments used to offer broadband services, noting that such a rate would facilitate the goals of the Telecommunications Act of 1996 by promoting broadband deployment and ensuring technology neutrality. Comments of AT&T at 10.

Most commenting parties also agree that the Commission has the authority to establish such a third formula rate. Current Group, LLC, a broadband over power line (BPL) provider, supports a broadband rate "distinct from the present 'cable' and 'telecommunications' rates." Comments of Current Group, LLC at 11. Like Ameren and Dominion Virginia Power, Current points to the U.S. Supreme Court's decision in *National Cable & Telecommunications Assoc. v. Gulf Power*, 534 U.S. 327, 335-36 ("*Gulf Power*"), wherein the Court noted the two existing pole attachment formulas and held that "nothing about the structure of the Act [suggests] that these are the exclusive rates allowed." Other commenting parties supporting the Commission's establishment of a third formula rate include: DAS Forum; Florida Power and Tampa Electric; Qwest; segTEL; T-Mobile; USTelecom; Verizon; and Zayo Bandwidth.[4]

2. The Broadband Rate Should Be Presumptive.

Ameren and Dominion Virginia Power argued in their initial comments that the broadband formula rate should be the presumptive rate for all attachments. Various comments lend credence to this position. MI-Connection Communications System, for example, which operates a cable system and opposes such a rate, nonetheless explains that virtually every cable operator, including small cable operators, now offers a trifecta of services that includes broadband:

[4] Comments of DAS Forum at 14; Comments of Florida Power and Tampa Electric at 12; Comments of Qwest at 4-5; Comments of segTEL, Inc. at 15; Comments of T-Mobile at 5; Comments of USTelecom at 4; Comments of Verizon at 3; Comments of Zayo Bandwidth at 4.

> In rural and underserved areas, cable service is more economically viable when it is bundled with cable modem and VoIP services. Almost all cable systems, both small and large, are using the benefits of digital fiber optic technology to realize these economies. As a result[,] applying the proposed rule to 'attachments used to provide broadband service as a part of a bundled package of services' will sweep up all, or almost all, cable systems into the new rate. [] Any system that offers bundled services and has even a handful of cable modem customers in its system, will have attachments throughout its system that are 'used for' broadband Internet access service, and are subject to the higher rate.

Comments of MI-Connection Communications System at 4-5, n.4. The Commission has tentatively concluded that the broadband rate should apply to "those pole attachments that are *used to offer* broadband Internet access service"[5] and Ameren and Dominion Virginia Power agree. As MI-Connection establishes, every attachment in a system that offers broadband service is in fact "used to offer" broadband service. For this reason various commenting parties, including AT&T, also support the establishment of a rebuttable presumption that all pole attachments are used to provide broadband. Comments of AT&T at 16; *see also* Comments of the Coalition of Concerned Utilities at 39-41.

B. The Broadband Rate Should Equitably Attribute the Full Costs of the Pole.

1. As Many Formulas As Comments

With considerable agreement for a broadband formula rate of attachment, the remaining question is the how the rate should be determined. The Commission has before it several suggestions. Several commenting parties urged the Commission to adopt either the cable rate or the telecommunications rate for broadband attachments. Generally, commenters seek to continue paying the rate they have previously paid.

Cable operators believe the Commission should reduce all rates, including those of ILECs and any potential broadband rate, to the cable rate. *See, e.g.,* Comments of Alabama

[5] NPRM, ¶ 36 (emphasis added).

Cable et al. at 21 (cable rate should apply to attachments of all attaching entities, including "similarly situated" ILECs); Comments of CenturyTel at 14 (optional unified rate should be set at the cable rate); Comments of Comcast at 30 (cable rate should remain applicable for all attachments over which cable deploys broadband and VoIP services). Cable operators generally argue that the cable rate is not an unconstitutional taking and therefore suffices to be "just and reasonable" under the Pole Attachments Act. Knology, for example, states that: "the cable rate adequately compensates utilities for the costs of attaching." Comments of Knology at 6.[6] This is apparently because the cable rate requires cable operators simply to pay for the space they use on poles that are in any event already "necessary for the provision of utilities' core services and would exist whether or not broadband providers were attached to them." *Id.* Further, cable operators allege that the cable rate, which is the lowest possible rate of attachment, would spur broadband deployment, and that any rate above the cable rate would be a tax or penalty on broadband deployment. *See, e.g.*, Comments of Comcast at 30; Comments of National Cable & Telecommunications Association at 17; Comments of Mississippi Cable Telecommunications Association at 3 (a third rate would be a "broadband penalty").

Interestingly, most telecommunications carriers, and other providers of broadband services, with whom cable companies now compete in the broadband marketplace, do not echo the cable operators' concern that a rate for broadband attachments that is set above the cable rate is either a penalty or a tax on their provision of telecommunications and broadband services. Indeed, telecommunications companies largely agree that the broadband rate should be at the telecommunications rate level, which is higher than the cable rate. Thus, Alpheus Communications and 360 Networks, DAS Forum, segTEL, and Zayo Bandwidth Entities all

[6] In addition, pole owners also may recover "their out of pocket, or incremental costs" for performing make-ready services. Comments of Alabama Cable Television Association *et al.* at 7.

suggest that the Commission adopt a rate near the telecommunications rate.[7] Still other communications companies, like Frontier Communications, state the FCC should adopt the telecommunications rate for broadband attachments. Comments of Frontier Communications at 4-5.

For their part, pole owners are aware that even the telecommunications rate, which depicts a far truer representation of the costs to maintain the pole infrastructure than does the cable rate, is not entirely perfect. Thus, several commenting parties suggest changes to be made to the telecommunications rate that would more accurately reflect the realities of attachment costs and the number and nature of attachments. The comments of Alabama Power *et al*., for example, support use of the telecom rate for broadband attachments, but seek changes to that formula to reduce the average number of attaching entities to a presumptive level that is more in line with competitive realities. Comments of Alabama Power et al. at 20-23. Other utilities take a similar approach: Tampa Electric and Florida Power & Light support a telecommunications rate with modified presumptions, including a use of forward-looking costs and more accurate presumptions regarding common space and the average number of attaching entities. Comments of Tampa Electric et al. at 15-16. Idaho Power supports use of the telecommunications rate with various modifications related to the communications worker safety zone allocation, and the presumptive number of attaching entities. Comments of Idaho Power at 6-7; *see also* Comments of PacifiCorp *et al*. at 18-19; Comments of Utilities Telecom Council at 13-14, 20-22.

The changes advocated above by certain pole owners would likely result in minor increases to existing telecommunications formula rates. In this regard, these positions are consistent with several other comments from pole owners who explicitly seek a rate higher than

[7] Comments of Alpheus Communications *et al.* at 5; Comments of DAS Forum at 14; Comments of segTEL at 15; Comments of Zayo Bandwidth Entities at 4.

the telecommunications rate for broadband attachments. Clark Public Utilities, for example, states that the new rate should "be at least the level of the current FCC telecom rate and preferably that of the APPA." Comments of Clark Public Utilities at 1. Allegheny Power and its six fellow utility commenters suggest the Commission adopt the telecommunications rate and add a surcharge to the rate in a method similar to that used by the City of Seattle, Washington. Comments of Coalition of Concerned Utilities at 39-41. Finally, Verizon suggests that the Commission should use the higher conduit attachment rate (which provides for no unusable space) for broadband attachment. Comments of Verizon at 6.

2. A Simpler Approach

The broadband rate methodology set forth in Ameren and Dominion Virginia Power's initial comments echoes the main telecommunications formula concerns set forth by other pole owners. It ends disputes over the Commission's presumptive number of attaching entities, which never reflected reality,[8] by settling on a presumption of a total of four attaching entities (including the pole owner) and using this number to determine a weighted average of pole responsibility for each type of attacher.[9] Similarly, the formula eliminates the inequitable allocation of unusable space by requiring all attaching entities to share in the cost of the entire pole.[10]

[8] *See* Comments at 23-24. Even cable operators, in opposing any use of the telecommunications rate, note that the number of competitive communications companies that led to the heightened presumptions has not materialized. *See, e.g,* Comments of Alabama Cable *et al*. at 12 (Congress errantly expected numerous attachers); Comments of Charter Communications at 9 (same).

[9] AT&T supports an assumption of four users on a pole. Comments of AT&T at 19.

[10] Presently, a pole owner is responsible for one-third of the cost of unusable space and for a share of the cost of the two-thirds unusable space. AT&T agrees that "the Commission should recognize this disparity in usage on the pole by making each pole user responsible for a percentage of the cost of the entire pole that reflects its specific allocation of the usable space." Comments of AT&T at 19. Similarly, Verizon's suggestion to use the conduit formula, which does not include any unusable space, seeks to remedy this anomaly with a different approach. Comments of Verizon at 6.

Ameren and Dominion Virginia Power's broadband formula has two advantages. First, it is easily administered.[11] It retains the calculation found in the telecommunications and cable formulas of the net cost of the bare pole and the total carrying charges, which are based upon verifiable FERC accounts that pole owners already maintain, and multiplies the product of these numbers by 20.59% for broadband providers, which is the weighted share of the total cost of the pole attributable to each non-utility attaching entity.[12]

Second, the rate formula is consistent with the notion of infrastructure partnership. In comments filed in this proceeding, and in *ex parte* presentations already made directly to the Commissioners, cable providers have attempted to analogize the cable rate to rent paid by tenants of a building.[13] Such an analogy, however, is flawed for various reasons, including the fact that the building owner has no mandate to give access to tenants or at set rates. A better analogy, however, which reflects the skewed market dynamic of pole attachment rent and regulation is that of a common carrier passenger train, which is required by law to allow passengers. At present, cable operators prefer to pay only the cost of taking up one seat on the train, arguing that the seat would have existed whether or not they occupied it. Regardless of what they do in that seat, they do not pay for the costs of other parts of the train that support their seat. The telecommunications formula, meanwhile, translates to a payment for the seat and certain of the costs of the train car upon which the seat is located. It does not pay, however, for the cost of the locomotive, which is not available to it.

The concept of infrastructure partnership, however, reflects that the locomotive, which powers the train, is a necessary part that benefits every passenger. Insofar as the passenger train

[11] Annual Broadband Rental = (Net cost of a bare pole) x (Total carrying charges) x 20.59%.
[12] The electric utility share of 36.78% is almost double that of such attachers. Similarly, ILECs' share of 24.26% is almost 25% higher.
[13] *See, e.g.,* National Cable & Telecommunications Association *Ex Parte* Notice, WC Docket No. 07-245 (filed April 14, 2008), Exh. "Cable Rent Not Subsidized."

is permitted to recoup the fair costs of the locomotive, the passenger cars, the cost of fuel, and the like, so too should a pole owner be permitted to recoup costs of the parts of the pole that are in the ground, above ground but below the required clearance level, and for other spaces like safety zones. All of these spaces, like all of the train to a passenger, benefit the attaching entity, and those costs should be fairly allocated among all passengers, or here, all attachers.

III. Joint Use is an Integral Part of an Infrastructure Partnership.

USTelecom and other consortiums of ILECs have requested that the Commission give them attachment rights under the Pole Attachments Act. Ameren and Dominion Virginia Power thoroughly explained in their initial comments that nothing in the statute, the legislative history of the law, or the Commission's precedent provides any support for this request.[14] Comments at 27-37. These comments were echoed by virtually every commenting party, including cable operators, wireless providers, electric utilities, and CLECs, and supported only by ILECs.[15] In these reply comments, Ameren and Dominion Virginia Power urge the Commission to decline to end the long and largely successful history of joint use that has been, and remains, a key part of an infrastructure partnership.

Joint use agreements between electric utilities and incumbent telephone companies began virtually upon the time at which the technologies coexisted. *See* Comments, Attachment 3 (joint use agreements date back to at least 1926). These agreements precede, and were left undisturbed by, the Pole Attachments Act of 1978, and amendments made in the Telecommunications Act of 1996. The need for these agreements was largely spurred by efficiencies and aesthetics, not to

[14] The same is true of the myriad commenters who have come forward seeking mandatory access to poles and/or regulated rental rates, with no statutory support, including providers of wireless broadband service, DAS, and BPL.
[15] *See, e.g.*, Comments of AT&T at 25; Comments of USTelecom at 11-13; Comments of Verizon at 5, 16.

mention obligations imposed by regulators and municipalities to avoid separate poles for use by the phone/telegraph and electric/streetcar companies then in existence.

Thus developed a truly joint relationship between these entities that included as a key feature a fair, if not always even, split of the ownership and maintenance of utility poles. Although these agreements typically included a stipulated rental rate, the rates were largely a formality as attempts were always made to keep pole ownership in parity. This relationship continues today. Oncor, for example, notes that it and the ILECs in its territory "have made it a priority to maintain parity. For example, the year 2000 pole count revealed AT&T and Verizon were out of parity. In order to achieve parity, AT&T purchased approximately 15,500 poles from Oncor, while Verizon purchased about 19,300 poles." Comments of Oncor at 26. As Oncor notes, "the relationships are working." *Id.*

The joint use relationship is beneficial not only to the parties, but also to the general public. Having two utilities available in storms and other events allows for faster identification of problems, and therefore more expedient restoration of services. Roberts Declaration at 2-3. Joint use also maintains the aesthetic and safety goals of having one half the number of utility poles in neighborhoods and city streets that separate systems might entail.

Joint use, of course, is not free. As all pole owners in this proceeding can attest, the cost of maintaining the pole infrastructure is considerable. Indeed, in Ameren and Dominion Virginia Power's experience, ILECs are lessening their joint use burden to alleviate these costs. *Id.* Because even non-regulated rates of attachment are far cheaper than the complete costs of owning utility poles, in Ameren's Missouri territory and Dominion's Virginia territory, the electric utility share of pole ownership has steadily increased over the years. In Dominion

Virginia Power's territory, for example, the ownership split in 1972 was 58% Dominion to 42% regional telephone company; today, the ratio is 63% Dominion to 37% Verizon. *Id.*

If ILECs are allowed regulated access rates, and to join the attaching entity side of the pole attachment equation, the joint use concept and its attendant benefits will end. ILECs already are making a competitive decision to leave the pole owning business, even at unregulated rental rates for pole access. At regulated rates that may be lower than their existing contracts, they will have every reason to end their joint use agreements with electric utilities. Such a result does not merely affect the number of poles, the rate ILECs may be able to pay, or their ability to bring complaints at the FCC. Rather, it will allow ILECs to end their decades-long responsibility to their customers and their community to help be stewards of the pole infrastructure. As renters on electric utility poles, ILECs will no longer have any requirement or any incentive, to restore poles in storms, or to police unauthorized or unsafe attachment practices of others on the pole.

Furthermore, electric utilities, which have no choice but to share poles with ILECs, will be the only entities remaining without a regulated rental rate.

If ILECs completely abandon their pole ownership, it will lead to unprecedented demand upon electric utilities for access and the requisite engineering and other attachment requirements. These increases, as well as increases in the number of poles, repairs, and replacements, all will increase the cost and time of providing pole attachments to all attachers. In short, there is no statutory basis or public policy reason for the Commission to upend the joint use relationship that has worked so well for so long.[16]

[16] The only dissent expressed regarding the relationship between electric utilities and ILECs in this proceeding is made by rural ILECs. *See* Comments of Windstream Corp.; Comments of National Telecommunications Cooperative Association (NTCA); Comments of Independent Telephone & Telecommunications Alliance. Windstream notes, for example, that its ILEC subsidiary pays more for attachments than does its CLEC affiliate. Yet, as noted above, a joint use rate is not easily compared because of the higher costs of being a pole owner and the offsets for joint ownership that are integral in such relationships; indeed, Windstream is a pole owner. Comments of Windstream at 4. Other rural ILEC concerns involve relationships with electric cooperatives that are themselves not

IV. Room Exists in an Infrastructure Partnership for Certain Wireless Attachments.

Perhaps the largest challenge before the Commission in this proceeding is crafting a safe and sensible wireless pole attachment policy. When Congress envisioned the regulation of pole attachments in the 1970s, it was concerned with the linear attachments of cable operators and, later in the Telecommunications Act of 1996, CLECs. Indeed, the very definition of utility in the Pole Attachments Act describes pole and conduit available for "any wire communications." 47 U.S.C. § 224(a)(1).

Through litigation, *wireless* telecommunications carriers have attained the same attachment rights possessed by their wireline competitors. *Gulf Power*, 534 U.S. at 341. The differences, however, between a linear attachment that merely contacts one pole after another along its route, and a non-linear attachment, typically an antenna, that uses one, specific pole for support, make it nearly impossible to apply the same formula to both types of attachment, and to apply the same presumptions as to typical attachment configuration (*i.e.*, the presumed one foot of space occupied by the attachment). Nonetheless, most utilities have reached an accommodation with wireless telecommunications carriers by charging rent based on some multiple of the per-foot linear attachment rental rate.

It is important to reemphasize here that attachment rights are not bestowed under the Pole Attachments Act upon wireless broadband providers, distributed antenna providers or other wireless entities that are not also regulated telecommunications carriers.[17] Consequently, any

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covered by the Pole Attachments Act, 47 U.S.C. § 224(a)(1), even if ILECs were to be included as attaching entities under the law. *See* Comments of NTCA at 5. In any event, Congress contemplated all types of ILECs in determining they are not entitled to regulated rates. Moreover, in virtually all states, joint use regulations provide adequate protections to all ILECs.

[17] Ameren and Dominion Virginia Power disagree with commenting parties that wireless broadband providers are entitled under law to mandatory access to utility poles. *See* Comments of Wireless Communications Association, Inc. at 2. Although these providers remain free to negotiate access to pole infrastructure, they are not granted attachment rights in 47 U.S.C. § 224.

effort to formalize a rental regime broad enough to include such entities will be unnecessarily and unjustifiably distorted.

A. Wireless Attachment Rate

1. Base Rate

Faced then with the requirement that wireless telecommunications carriers are entitled to access to utility poles (subject as always to safety and engineering concerns), the Commission should determine an appropriate rate methodology for such attachments made to the utility pole, and where permitted, extending above the top of the pole. Ameren and Dominion Virginia Power advocated in their initial comments that wireless attachments, which encompass a variety of types and sizes, should pay a rental rate per attachment (based on whether they offer broadband services or not) based upon the number of feet their attachment requires, multiplied by the per-foot rental rate. Comments at 37-38. This approach is supported by a variety of commenting parties including DAS Forum, Extenet Systems, and NextG Networks.[18]

2. Presumptive Space

T-Mobile recommends the Commission adopt a presumption that a wireless attachment occupies one foot of space on a pole. Comments of T-Mobile at 5. Such a presumption, however, is inaccurate and unnecessary. Other commenters, including DAS Forum, explain that a "typical DAS attachment is five feet in length, so charging five times the telecommunications rate would be both logical and fair." Comments of DAS Forum at 13-14. Not every wireless attachment is based on a DAS architecture and wireless attachments do not fall neatly into any occupied space presumption. In Ameren and Dominion Virginia Power's experience, the size of wireless attachments varies widely, from attachments of about a foot, to well over ten feet.

[18] Comments of DAS Forum at 13; Comments of Extenet Systems at 4; Comments of NextG Networks at 19. Citation of their position on the rental rate to which some of these entities wish to be subject is not meant to imply that Ameren and Dominion Virginia Power agree that they are entitled to access or to a regulated rental rate.

Roberts Declaration at 3. The Commission should not adopt a presumption that does not reflect a universal configuration of the facilities.

An occupied space presumption in and of itself is unnecessary. The multiplication of the telecommunications or broadband rate by the number of feet taken up by a wireless attachment made to a pole is not difficult to administer or for parties to establish in negotiating a pole attachment agreement. The attachments, their size, and their location, are readily available to the contracting parties as they determine appropriate rates.

B. Expansion of Capacity

T-Mobile posits that the "Commission should require utilities that allow one party to expand pole capacity to offer that option to other attachers." Comments of T-Mobile at 7. The Commission must reject this request. As an initial matter, it is settled that pole owners have no obligation to remove poles and replace them with taller poles. *Southern Company v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002). This is true even if, at any point previously, the pole owner changed poles at the request of a joint user, another party, or upon its own initiative. Moreover, some utilities, including Ameren and Dominion Virginia Power, may voluntarily change out a pole with a taller pole, at the wireless carrier's expense, to accommodate the wireless carrier's coverage requirements. Roberts Declaration at 3.

Pole replacement is an expensive, time-consuming and resource-consuming process. Various factors must be considered, including alternative options for access, whether the attaching party is willing to pay the change-out costs, and the impact on the specific location and on other attaching entities. Under a concept of infrastructure partnership, where all attaching entities share in the responsibility and cost for maintaining pole infrastructure, the ability to change out smaller poles may be more readily accomplished. In many instances, however,

community standards, engineering and access issues may continue to preclude ever-larger poles from being used in many locations. *Id.*

C. Rivalrous Poles

Regardless of an individual utility's pole change-out policy, the space on utility poles is finite. At some point, neighborhood zoning requirements, the limit of bucket-trucks to reach extra-tall poles or other factors will operate to limit the height of distribution poles, which, it must be remembered, are the only type of poles that are subject to pole attachment obligations. *Southern Co. v. FCC*, 293 F.3d at 1345. The point may be reached where the pole is at capacity, due especially to the size of the wireless attachments. As DAS Forum notes, for example, DAS antennas, which tend to be smaller than cellular base station antennas, can occupy five or more feet of space, without taking into account accoutrements like wires, power supplies, and the like. Comments of DAS Forum at 13-14.

The Commission should remain mindful that the 11th Circuit has ruled that pole owners are free to move out of the regulated rates of the Pole Attachments Act where poles are at capacity and have become "rivalrous." *Alabama Power Company v. FCC* 311 F.3d. 1357, 1370-71 (11th Cir. 2002). A proliferation of wireless attachments that could result from an unwarranted expansion of attachment rights to include the myriad, non-qualified commenters that have come forward in this proceeding, could quickly make a pole rivalrous. The ironic result would be the creation of rivalrous poles and the rescission of the very mandated rates these companies have sought from the Commission.

D. Pole Top Attachments

Ameren and Dominion Virginia Power previously noted that pole top attachments should not be mandated. Comments at 38. Some utilities attach electrical and other facilities at or near

the top of the pole, making pole top attachments impossible. Many others, including Ameren and Dominion Virginia Power, limit the practice because of the difficulties of changing and repairing poles and attachments when the pole is capped by wireless antennas. Roberts Declaration at 3.

For utilities that allow attachments to be made to the top of a pole, the rate for such attachments should continue to be determined by the pole owner and attaching entity, subject to a just and reasonable standard. Such attachments increase the burden on the pole, especially in terms of wind loading and ice loading and the discretion whether or not to allow them, and at what rental rate, must be made locally, taking into account local climate conditions and the regulations of the local public utilities commissions.

CONCLUSION

The Commission must protect the utility infrastructure as it considers the requests made in this proceed by myriad parties for attachment rights and for revision of pole owner policies and practices. Ameren and Dominion Virginia Power believe that, by the Commission's adopting sound policies and encouraging the concept of infrastructure partnership, the Commission can provide a harmonious and lasting framework for pole attachment regulation.

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